available, Verizon checks to determine whether an existing Verizon customer served by UDLC or copper in the same service area can be transferred to an IDLC facility, thereby "freeing up" an unbundled loop for the CLEC to use. Finally, if 2-wire loop facilities are still unavailable, the CLEC may still serve the customer using resold facilities or the unbundled network element platform, and the CLEC may **use** the Bona Fide Request process to define, evaluate and develop new and different types of unbundled loops that could potentially be used to serve end users currently serviced by IDLC.

Despite the FCC's consistent endorsement of Verizon's loop unbundling practices, Cavalier claims they are inadequate and asks for a trial of two proposed methods for unbundling IDLC loops. If Cavalier were seriously interested in testing these approaches, it could have submitted a Bona Fide Request to pursue them. Cavalier, however, has never done so, and does not even attempt to explain why the Bona Fide Request process is inadequate. Cavalier's lack of serious interest in this issue is also reflected in its actions before this Commission. Cavalier filed a complaint about the unbundling of IDLC loops in ***Petition of Cavalier Telephone, LLC for Arbitration of Interconnection Rates, Terms and Conditions with Verizon Virginia Inc.***,[106] but abandoned the proceeding the day before hearings were to begin.[107]

Furthermore, one of the two approaches that Cavalier claims should be tested, "multiple switch hosting" has already been examined in the New York collaborative process and found wanting. **As** for the other approach, the "hair pin" or "nail-up" proposal, even Cavalier concedes that approach, could be used only when Cavalier seeks access to a "limited number" of IDLC

[106] Case No. **PUC** 99019.

[107] ***Id.,*** Order of Dismissal (February 21, 2001).

lines.[108] There is, therefore, no good reason for this Commission to mandate a test of these approaches.

Alternatively, Cavalier asks for liquidated damages of $3,000 per line if, in any month, more than one percent of the loops ordered by Cavalier cannot be satisfied because of the technical problems associated with IDLC technology. However, there is no reason for such penalties in light of the fact that Verizon already provides Cavalier with the alternatives, described above and approved by the FCC. Moreover, Cavalier could "game" a procedure by concentrating its loop orders in areas served by IDLC technology, or by repeatedly submitting orders for the same customers served by IDLC technology. (Cavalier could determine whether a particular customer was served by IDLC simply by using the pre-order process.)

For all these reasons, then, Cavalier's alternative proposals should both be rejected.

[108] Cavalier **Exhibit** C at 14.

<u>ARBITRATION ISSUE 15: Hot Cuts</u> - Should the parties establish a joint trial to better streamline the process of hot cuts?

> **<u>Cavalier's Position:</u>** The parties should engage a trial to develop **a** new software controlled hot cut process that would eliminate the "cutover coordination" procedure. The current rate should not exceed ***$35*** until such a new process is introduced.
>
> **<u>Verizon's Alleeed Position:</u>** The development of a new process is currently underway in New **York.** The New Jersey Commission set the cap on the rate. There does not need to be any further trials.

<u>Verizon's Actual Position and Proposed Resolution:</u>

Cavalier attempts to manufacture a problem about hot cuts and then to use that fictional problem as **an** excuse for a potentially endless series of subsidy payments.

First, there is no hot cut problem. Verizon's hot cut process has received SIO 9000 quality certification. In its recent filing to obtain long distance authority, Verizon showed that it is provisioning unbundled loops, including hot cut, in a fair and non-discriminatory way. Specifically, Verizon showed that it is providing hot cuts, in Virginia in the same way that it does in New **York,** Massachusetts, New Jersey, and Pennsylvania – jurisdictions where the FCC has reviewed and approved these practices and allowed Verizon into long distance. In fact, hot cuts were not even raised as an issue in this Commission's recent proceedings on Verizon's long distance application.

Cavalier's only objection is about the small class of hot cuts involving IDLC facilities. That, however, is not a hot cut problem. Cavalier's complaint simply reflects the fact that 2-wire analog IDLC loops cannot feasibly be unbundled. **As** Verizon has shown, in those instances, it makes all reasonable efforts to make other loops or service arrangements available to **Cavalier.**[109]

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[109] **See** Issue 14, ***supra***

Here, however, Cavalier conjures **up** an illusory hot cut problem so that it may pay a heavily subsidized rate – **$35 – for** hot cuts until its non-existent problem is solved. The New **York,** New Jersey, and Delaware commissions, however, all agree that the real cost for hot cuts is far more than $35. In Virginia, Verizon has filed cost studies showing that the hot cut rate should be **$139.43.**[110] Cavalier's demand for this open-ended subsidy should therefore be rejected.

[110] **See Verizon's cost studies and testimony tiled in** ***In the Matter*** of ***Petition*** of ***WorldCom, Inc., Cox Virginia Telcom, Inc., and AT&T Communications of Virginia Inc., Pursuant Section 252(e)(5)*** of ***the Communications Act for Preemption of the Jurisdiction*** of ***the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., CC*** Docket **Nos.** 00-218, 00-249, 00-251, **DA** 02-1731.

ARBITRATION ISSUE **16:** Embargoes on Orders and Services - Should the parties be allowed to embargo the provision of services, absent commission authorization, to each other **as** a mechanism to resolve disputes?

Cavalier's Position: In the absence of any specific Commission ruling, the parties should first bring their grievances to the Commission for resolution before shutting off service. Until determined by the Commission the classification of "bona-fide" rests with the service provider.

Verizon's Alleged Position: Verizon determines if the dispute is bona-fide or not, whether or not the issue is a payable or receivable.

Verizon's Actual ***Position and Proposed Resolution:***

Verizon proposes that, if there is a payment dispute between the parties and one of the parties seeks to exercise its right under traditional contract law to terminate service for non-payment, that party must first give the other party written notice 45 days prior to the termination of service. [Is this what the draft contract says?] If the other party believes that termination of service is unwarranted, this notice provision will give it more than adequate opportunity to seek adequate injunctive relief in whatever forum it chooses.

Cavalier's alternative is far too broad. Under its approach, a party could refuse to pay for the flimsiest of reasons, without any consequence, as long as there is any unresolved Commission proceeding relating to the dispute. Creative lawyering could string such Commission proceedings out for years. Cavalier's proposal should therefore be rejected.

ARBITRATION ISSUE 17: Unified Make-Readv Process for Pole Attachments - Should a revised and more efficient unified make-ready process for pole attachments be implemented.

> Cavalier's Position: In Cavalier's experience with Verizon, there are inherent inefficiencies in Verizon's make ready processes, such as the requirement that each party attached to the poles perform its own separate engineering and construction work to make the poles ready for new attachments, and the delays in obtaining reasonable responses in a timely fashion. Verizon's processes cause unnecessary delays to Cavalier's ability to build its network.
>
> Verizon's Alleged Position: Verizon does not believe a unified make-ready process for pole attachments is needed and has not provided any specific reason justifying this position.

Verizon's Actual Position and Proposed Resolution:

Cavalier's proposal is unwarranted. In this Commission's recent inquiry into Verizon's application to provide long distance service, Verizon showed that it was providing access to poles, ducts, conduit, and rights of way in compliance with all requirements of the Act. Specifically, it showed that it was providing more than 150,000 pole attachments to more than 50 telecommunications carriers, 130 cable television companies, and 20 other parties in Virginia.[111] Verizon also showed that it was providing CLECs with better service than it was providing to itself.[112]

In that proceeding, in which dozens of interveners attempted to pick apart Verizon's performance in every conceivable way, only Cavalier complained about pole attachments, and its claims about the purportedly burdensome process were belied by the fact that Cavalier had submitted only six applications for pole attachments in the past 18 months. Based on this record,

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[111] *Virginia Hearing Examiner Report* at 94

[112] (Verizon completed make ready work for CLECs and others in an average of 94 days, while it completed its own make-ready work within an average of 217 days.) See *Virginia Hearing Examiner Report* at 93.

the Hearing Examiner concluded that Verizon was providing access to poles, ducts, conduit, and rights of way in compliance with the requirements of the Act.[113]

In spite of this excellent record, Cavalier now demands that Verizon institute a new "unified" process that would require the renegotiation of arrangements with every telecommunications carrier, cable company, power, or other company with which Verizon shares pole space anywhere in Virginia. This is overkill. The FCC has not required incumbents to permit third parties to work on their facilities. When Cavalier urged the FCC to impose a comparable process on Dominion Virginia Power, the FCC refused, ***Cavalier Telephone, LLC v. Virginia Electric and Power Company,*** Order and Request for Information, 15 FCC Rcd 9563, ¶ 19 (2000), and this Commission should as well.

[113] ***Virginia Hearing Examiner Report*** at *95.*

ARBITRATION ISSUE **18:** Local and Toll Billing Data **-** Should Verizon's processes and responsibilities for identifying local traffic and access traffic be improved?

> Cavalier's Position: Cavalier has identified a problem in Verizon's processes for identifying traffic as either toll or local. This affects many of Cavalier's access bills to and from other carriers and is a problem that should be addressed in clearer responsibilities and procedures in the information that Verizon provides to Cavalier so that Cavalier is not overcharging or undercharging other carriers and vice versa.
>
> Verizon's Alleeed Position: Unknown.

Verizon's Actual Position and Proposed Resolution:

There is no problem in Verizon's processes for recording billing details for Cavalier's traffic and providing those billing details to Cavalier. Cavalier's concern involves calls between Cavalier and other CLECs that travel through a Verizon tandem switch. In this arrangement, Verizon bills the originating CLEC for transit services and it passes a billing record to the terminating CLEC so that it can bill the originating CLEC for the call termination. Cavalier complains that the rates it charges the originating CLEC depend on whether the call is local or toll, and the billing records provided by Verizon do not separate identify local calls from toll calls.

However, the billing details Verizon provides to Cavalier do include both the calling and called number, so Cavalier can determine for itself what calls are local and which ones are toll. Verizon cannot practically do this because it is not **a** party to contractual arrangements between Cavalier and other CLECs and therefore does not **know** which calls these parties have agreed to treat as "local" and which calls they have agreed to treat as "toll."

If Cavalier believes that improvements can be made in the billing information provided to the terminating carrier in this instance, there is a better forum than this arbitration to explain those views. **A** national standards organization, the Ordering and Billing Forum is currently considering this very issue. Certainly, it is far better to develop a consistent national solution in a forum like the Ordering and Billing Forum, rather than to develop a series of potentially inconsistent solutions in carrier-by-carrier arbitrations. Cavalier's proposal should therefore be rejected.

<u>ARBITRATION ISSUE 19: Network Rearrangement</u> - Should Verizon he allowed to charge Cavalier for Verizon's network rearrangements?

<u>Cavalier's Position:</u> On occasion, Verizon will notify Cavalier that Verizon is undertaking network rearrangements, such as the moving of a tandem switch from one location to another location after Cavalier has interconnection arrangements with Verizon at the former location. This is occurring with Verizon's plans to rehome its tandem switching capabilities at its Tatnall Street, Wilmington location. Verizon then requests that Cavalier compensate Verizon in part for Verizon's network rearrangements that have little or nothing to do with Cavalier's use of the network. Cavalier believes that is unfair and discriminatory and that Verizon should bear its own costs for such rearrangements.

<u>Verizon's Alleged Position:</u> Verizon believes that CLECs should share these costs.

<u>Verizon's Actual Position and Prouosed Resolution:</u>

Cavalier's petition erroneously suggests that Verizon has asked Cavalier to pay Verizon's costs associated with network rearrangements, but Cavalier's proposed contract language makes clear what Cavalier is really demanding. Cavalier wants Verizon to pay **Cavalier's** costs for rearranging **Cavalier's** network when those changes are somehow related to rearrangements that Verizon has made in its own network, for example to accommodate growth or technology change. This is just one more Cavalier demand that Verizon subsidize Cavalier's operations.

Network rearrangements are a cost of doing business. Verizon's longstanding arrangement with CLECs is that each carrier bears the cost of rearranging its own network. There is no reason for varying that standard industry practice to benefit Cavalier.

V. SUPPLEMENTAL ISSUES

<u>ARBITRATION ISSUE 20: Adoption Of Verizon's Exhibit A</u> - To The Extent That Cavalier Has Failed To Dispute Verizon's Positions And Proposed Contract Language, Should The Commission Order Inclusion Of That Language In The Resulting Interconnection Agreement?

<u>Cavalier's Position</u>: Cavalier alone should be permitted to define the appropriate scope of changes that should be made to the parties' existing interconnection agreement. Cavalier should not have to review Verizon's current contract proposal, analyze whether it is acceptable, or describe how it is objectionable.

<u>Verizon's Actual Position and Prouosed Resolution</u>

As described in Section III detailing the parties' negotiations and in Verizon's response to Issue 1 relating to the "template" issue, Cavalier has eschewed its § 251(c)(1) duty to negotiate in good faith and its § 252(b)(2) responsibility as a petitioner. Despite the fact that Verizon provided Cavalier with its proposed contract language on numerous occasions during the course of the parties' negotiations, Cavalier simply refused to read it, analyze it, or respond to it in any meaningful way. Even with its Petition, Cavalier entirely failed to acknowledge, much less set forth, all unresolved issues and Verizon's position as to those unresolved issues and disputed contract language. It is Cavalier that chose to start the process of arbitration and to do so prior to a time when it had read, considered, and responded to Verizon's proposed contract. Simply by filing its Petition, Cavalier cannot shift to Verizon the duty to determine what Cavalier ***might*** object to if it actually bothered to read Verizon's proposed contract terms. Accordingly, Verizon has not attempted to do so.

Rather, Verizon has undertaken the monumental task of preparing its proposed agreement using the parties' existing agreement ***as amended*** as a starting point. To do so, Verizon started with the July 17, 1997 interconnection agreement between its predecessor, Bell Atlantic-

Virginia, Inc., and MCImetro Access Transmission Services of Virginia, Inc., as amended,[114] because Cavalier adopted that agreement effective January 13, 1999[115] for use in Virginia ("1999 Adopted Agreement"). Verizon and Cavalier twice agreed to amend the 1999 Adopted Agreement. Amendment No. 1, dated June 5,2000, to the 1999 Adopted Agreement provided new terms for sub-loop, dark fiber, and collocation in remote terminals, among other things.[116] Amendment No. **2,** dated October 24,2000, to the 1999 Adopted Agreement provided new interconnection terms.[117] The appropriate starting point includes both amendments to the 1999 Adopted Agreement, neither of which had previously been integrated into a single document by either Verizon or Cavalier.

To the starting point document Verizon then adds its proposed contract language, which it previously provided Cavalier in the form of its model interconnection agreement Verizon went through the process of integrating its proposal into the parties' 1999 Adopted Agreement, as amended, in Virginia. Verizon's resulting proposed contract is attached at Exhibit A.

Because Cavalier responded neither to Verizon's model interconnection agreement or its modified template for New Jersey, Verizon has no reasonable basis to represent Cavalier's agreement or disagreement. Cavalier has again chosen to offer no explanation or analysis in its Petition. As a consequence of Cavalier's changing position in negotiations and inadequate Petition, Verizon is unable to project with any accuracy all of the disputed contract language. Furthermore, Verizon cannot project through the identification of supplemental issues all remaining areas of disputed issues. Nor should Verizon be held to such a standard, when

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114 *See* Exhibit C.

115 *See* Exhibit D.

116 **See** Exhibit E.

117 **See** Exhibit F.

Cavalier has repeatedly failed to provide Verizon any basis for doing so. Instead, in light of the circumstances of the parties' negotiations and Cavalier's inadequate Petition, the Commission should order the parties to include all contract language included at Exhibit A that Cavalier has failed to dispute

To further assist both Cavalier and the Commission in evaluating the differences between the 1999 Adopted Agreement, **as** amended, and Verizon's current proposal (Exhibit A), which includes portions of its model interconnection agreement, Verizon highlights'[18] below its revisions to the parties' existing agreement:

<u>Part A (general terms)</u>:

- Used existing agreement as base.
- Term of agreement **(§ 3):** replaced with model agreement language (as discussed in connection with Issue **2)**
- Charges and Assurance of Payment (§ **4):** replaced with model agreement language (as discussed in connection with Issue **23)**
- Insurance (§ 11A): added from model agreement language **(as** discussed in connection with Issue 21)
- Performance Standards **(§ 34):** added from model agreement language (as discussed in connection with Issue **24)**

<u>Part B (definitions)</u>:

- Used existing agreement as base, but modified various terms, reciprocal compensation proposal as discussed in connection with Issue **23.**
- The following terms were modified: Exchange Access, Network Element, NID, POI, Reciprocal Compensation, Telecommunications Carrier, Telecommunication Services, Telephone Exchange Service;
- The Following terms were added EMI, Extended Local Calling Scope Arrangement, FCC Internet Order, Information Access, Measured Internet Traffic, Rate Center Point, Rate Demarcation Point, Reciprocal Compensation Traffic, Routing Point, Toxic or Hazardous Substance, Traffic Factor 1 (PIU), Traffic Factor 2 (PLU);
- The following terms were deleted AMA, ALI, ALI/DMS, Bell Atlantic, CABS, Common Transport, Conduit, Dedicated Transport, DA, DA-Database, DL, EMR, INP, Local Interconnection, Local Resale, Local Switching, Local Traffic, MCIm, Network

118 Verizon does not purport **to provide** an **exhaustive list.**

Rate Demarcation Point, Non Discriminatory, PIU, PLU, Tandem Switching, Telecommunications.

Attachment I (price schedule):

- Current model agreement

Attachment II (resale):

- Used existing agreement

Attachment III (network elements):

- Used model agreement language as base
- Add language from Amendment No. 1, dated June 5, 2000, regarding Subloop, Dark Fiber (adding new language for Dark Fiber IOF language addressing intermediate offices and inquiry responses and also Parallel Provisioning as discussed in connection with Issue 9), and Collocation at remote terminals
- Added language from proposed DDL amendment (as discussed in connection with Issue 7)

Attachment IV (interconnection):

- Using existing agreement as base, replacing § 1 with language from Amendment No. 2, dated October 24, 2000 (but replacing § 2 with VGRIP language as discussed in connection with Issue 4)
- Integrated Verizon's reciprocal compensation proposal (as discussed in connection with Issue 23)

Attachment V (collocation):

- Replaced with model agreement language (as discussed in connection with Issue 21)

Attachment VI (rights of way):

- Used model agreement language (as discussed in connection with Issue 25)

Attachment VII (number portability):

- Deleted Interim Number Portability provisions

Attachment VIII (business process requirements):

- Deleted operator services § 6.1.4
- Section 2.2.3 now references updated language in Attachment III, § 3.3

- Added §§ 6.1.6.16 and 6.1.6.17 (Indemnification and Liabilities in Directory Listings General Requirements)

Attachment IX (security requirements):

- Used existing agreement

Attachment X (performance reporting):

- Deleted as discussed in connection with Issue 24

Notwithstanding Cavalier's failures, Verizon has not only attempted to put together a working document for negotiations, Verizon has either explained its positions in connection with the original issues and in supplemental issues, to the extent that it was able to reasonably project potential open issues with Cavalier. **As** Cavalier recognized in its Petition, page 8, with respect to the existing agreement, "there are several areas that need to change." Although Verizon has done no more in negotiations and in this Response than continue to advocate its view of what needs to "change," Cavalier seems to think that it alone should be permitted to define the appropriate scope of changes that should be made to the parties' existing interconnection agreement. There is no merit to this assertion. To negotiate in good faith, Cavalier must recognize that it has a duty to consider Verizon's proposed changes. Because Cavalier has failed to identify if it disputes a great bulk of Verizon's proposed contract, and if so, why, the Commission should order the parties to adopt Verizon's proposed Exhibit A in its entirety

<u>ARBITRATION ISSUE 21: Insurance And Indemnity</u> - Should insurance levels be increased to commercially reasonable levels? Should indemnity provisions be clarified, inter alia, so that they cover the parties and their officers, directors, employees and affiliates?

(Verizon's Proposed Agreement at ¶ ¶ 21.1-21.7; 24.1-24.4.)

<u>Cavalier's Position:</u> Unknown.

<u>Verizon's Actual Position and Proposed Resolution</u>

Because Verizon is required to enter into interconnection agreements with CLECs, it is reasonable to require CLECs to obtain insurance in order to protect Verizon's network, personnel, and other assets in the event that a CLEC has insufficient financial resources. The FCC and numerous state commissions have recognized the reasonableness of such a requirement.[119] In particular, the FCC has concluded that "LECs are justified in requiring interconnectors to carry a reasonable amount of liability insurance coverage":[120]

[119] *See, e.g., In the Matter of Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport, Second Report and Order,* FCC Docket *No.* 93-162, FCC 97-208, FCC Rcd. 18,730(1997), ¶¶ 343-55 *("FCC Second Report"). See* M.D.T.E. Tariff 17, Part E, §§ 2, 2.3.4; **see** *also Petition of NEXTLINK Pennsylvania, L.L.P. for Arbitration of an Interconnection Agreement with Bell Atlantic-PA, Inc., Pursuant to the Telecommunications Act of 1996,* Docket No. A-310260F0002 (Interconnection Arbitration), Pennsylvania Public Utility Commission, 1998 Pa. PUC LEXIS 208, (May 22, 1998) (approving interconnection agreement containing provision requiring CLEC to maintain commercial general liability insurance, comprehensive automobile insurance, umbrella form excess liability insurance, statutory worker's compensation insurance and employer's liability insurance); *Petition* ***of*** *TCG Pittsburgh for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Bell Atlantic-Pennsylvania, Inc.*, Docket No. A-310213F0002 (Interconnection Arbitration), Pennsylvania Public Utility Commission, 1996 Pa. PUC LEXIS 119, *30, *60-61, (September 6, 1996) (requiring CLEC to incur expense to procure and maintain specific classes of insurance with a company having a BEST insurance rating of at least AA-12). *Accord Petition of AT&T Communications of New York, Inc. for Arbitration of an Interconnection Agreement with New York Telephone Company,* CASE 96-C-0723, New York Public Service Commission, 1997 N.Y. PUC LEXIS 360, (June 13, 1997) (approving an interconnection agreement requiring (1) comprehensive general liability insurance, (2) umbrella/excess liability insurance, (3) all risk property coverage, (4) statutory worker's compensation coverage, and (5) employer's liability coverage).

[120] *FCC Second Report* at ¶ 345

> [D]ue to the unique circumstances posed by physical collocation, we find that it is not unreasonable for LECs to require interconnectors to maintain a reasonable amount of general liability and excess liability insurance coverage to protect against occurrences that may potentially arise out of the physical collocation arrangement. We disagree with Teleport's argument that the physical collocation arrangement is the equivalent of adding a few racks of multiplexing equipment and therefore poses no additional risk to a central office. We find that the presence of interconnectors in the LECs' central office adds additional risk to the LECs' property and operations because the LECs do not have control over the interconnectors' equipment or the personnel that operate the equipment. In the absence **of** such control, we find that it is not unreasonable for LECs to require general liability insurance to protect against property damage to the LECs' equipment, personal injury to the LECs' employees, and losses to the LECs' customers because of service interruptions caused by interconnectors."'

The dollar amount of insurance, said the FCC, **"is** not unreasonable as long as it does not exceed one standard deviation above the industry average,"[122] which the FCC calculated as $21.15 million (in 1997).[123] The aggregate amount of insurance Verizon seeks from Cavalier falls well below this threshold amount. The highlights of Verizon's insurance provisions include:

- **A** requirement to maintain appropriate insurance and/or bonds during the term of the interconnection agreement.
- Commercial general liability: $2,000,000.
- Commercial motor vehicle liability insurance: $2,000,000.
- Excess liability insurance (umbrella): $10,000,000.
- Worker's compensation insurance as required by law and employer's liability insurance: $2,000,000.
- **All** risk property insurance (full replacement cost) for Cavalier's real and personal property located at a collocation site or on Verizon premises, facilities, equipment or rights-of-way.
- Deductibles, self-insured retentions or loss limits must be disclosed to Verizon.

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[121] *Id.* at ¶ 345.

[122] *Id.* at ¶ **346.**

[123] *Id.* at ¶ 348.

- Cavalier shall name Verizon as an additional insured.
- Cavalier shall provide proof of insurance and report changes in insurance periodically.
- Cavalier shall require contractors that will have access to Verizon premises or equipment to procure similar insurance.

Verizon and carriers like Cavalier operate in a highly volatile industry where CLEC insolvency has become commonplace. In addition, it is quite possible that Verizon could be held jointly and severally liable with Cavalier, for millions of dollars, because of the acts of Cavalier. Under these circumstances, the insurance levels sought by Verizon are reasonable.

Verizon also proposes changes to the agreement's indemnification provisions to clarify the kinds of claims that are subject to indemnification, the persons and entities covered by the indemnification provisions, and the process that the parties must follow in the event of a claim for which indemnification is warranted. The revised language clarifies, among other things, that indemnification extends not only to covered claims against one of the parties, but also to covered claims against officers, directors, employees, or affiliates of the parties. These terms are commercially reasonable and should be approved.

<u>ARBITRATION ISSUE 22: Reciprocal Compensation/Intercarrier Compensation</u> - Should The Interconnection Agreement Provide For Intercarrier Compensation Consistent With The Requirements Of Preemptive Federal Law, Including The FCC's *ZSP Remand Order?* (Verizon's Proposed Agreements at Definitions §§ 1.26a, 1.31a, 1.40, 1.44a, 1.61a, 1.61b, 1.71, 1.71a, 1.71b, 1.74, 5.72, 5.7.3, 5.7.4, 5.8)

<u>Cavalier's Position:</u> In an ultimately futile effort to continue receiving windfall reciprocal compensation payments for as long as possible, Cavalier is trying to set up roadblocks to Verizon's implementation of the ***ISP Remand Order.*** Cavalier also demands that the agreement include terms and condition now rejected by the FCC.

<u>Verizon's Actual Position and Proposed Resolution</u>

The FCC's ***ISP Remand Order*** established a new compensation structure for Intemet-bound calls that are passed from one local carrier (usually the incumbent, like Verizon) to another local carrier (often a CLEC, like Cavalier) on the way to an Internet Service Provider ("ISP") and on to a distant Web site on the World Wide Web. Because calls to the Internet are strictly one-way and occur in extremely high volumes for longer than average holding times. CLECs like Cavalier had a huge incentive to focus almost exclusively on serving ISPs as customers so they could receive very large monthly reciprocal compensation payments from incumbent carriers (who have most of the end-user customers making calls to ISPs). In the ***ISP Remand Order,*** the FCC found that requiring reciprocal compensation payments for Intemet-bound traffic is contrary to sound public policy and has retarded the growth of true local telephone competition because "carriers have targeted ISPs as customers merely to take advantage of these intercarrier payments" and "compete, not on the basis of quality and efficiency, but on the basis of their ability to shift costs to other carriers."[124] **As** a result, the FCC decided to phase out payments for Internet-bound traffic.

[124] ***In the Matter of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic,*** **CC Docket Nos.** 96-98, 99-68, **FCC** No. 01-131 (rel.
(continued.. .)

The FCC also determined in its ***ISP Remand Order*** that Internet-bound traffic is not, and has never been, subject to the reciprocal compensation obligations of the Act.[125] To phase out CLEC reliance on this uneconomic arbitrage, payments under the FCC's new compensation regime decline over a 36-month period: $0.0015 per minute of use ("MOU") for the first six months after the effective date of the Order (June 14,2001 - December 13,2001); $0.0010 per MOU for the next 18 months (December 14,2001 - June 13,2003); and $0.0007 per MOU for the last 12 months (June 14,2003 - June 13, 2004).[126] In ¶¶ 8 and 79 of the ***ISP Remand Order***, the FCC further establishes the presumption that traffic above a 3:1 ratio of terminating to originating traffic is Internet-bound, while traffic below a 3:1 ratio is § 251(b)(5) traffic subject to reciprocal compensation. These are substantial reductions from the reciprocal compensation rate that most CLECs now receive.

Although the D.C. Circuit has remanded the ***ISP Remand Order*** to the FCC for further consideration of the legal basis of its rule, it "d[id] not vacate" the FCC's order.[127] Instead, finding it "plain[]" that there is "a non-trivial chance that the Commission has authority" to hold that, under federal law, carriers are not required to pay reciprocal compensation for Internet-bound traffic, the court left the ***ISP Remand Order*** in place and "simply remand[ed] the case to

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April 27,2001) ("***ISP Remand Order***") ¶¶ 2, 4; ***see also, e.g., id.*** at ¶ 5 (CLEC "decisions are driven by regulatory opportunities that disconnect costs from end-user market decisions. . . . This result distorts competition by subsidizing one type of service at the expense of others") and ¶ 21 ("traffic to an ISP flows exclusively in one direction, creating an opportunity for regulatory arbitrage and leading to uneconomical results").

[125] ***Id.*** at ¶¶ 30, 39, 42-47.

[126] ***Id.*** ¶¶ 8, 85.

[127] ***WorldCom, Inc. v. FCC,*** 288 F.3d 429,434 (D.C. Cir. 2002).

the Commission for further proceedings."[128] The D.C. Circuit's refusal to vacate the *ISP Remand Order* means that the order — including its holding that ***Internet-bound traffic is not subject to the reciprocal compensation requirement in § 251(b)(5)*** and its regulations implementing that holding — ***remains binding federal law***.[129]

Verizon's Intercarrier Compensation Proposal comports with the FCC's requirement that Internet Traffic is not subject to Reciprocal Compensation.

Measured Internet Traffic (Definitions § 1.44a). Both Internet Traffic and Measured Internet Traffic are excluded from compensation pursuant to § 251(b)(5) of the Act. Verizon's use of the two terms, however, distinguishes Internet traffic that is subject to the FCC's interim rate cap regime and traffic that is not. As used by Verizon, "Measured Internet Traffic" is that traffic that is locally rated and thus is subject to the FCC's interim rate cap regime. It is necessary to make this distinction for measurement and billing purposes because the FCC's *ISP Remand Order* only concerns locally rated Internet-bound traffic and does not displace the pre-existing toll and access regimes."' This distinction is also reflected in Verizon's definitions of "Toll Traffic,"[131] "Traffic Factor 1,"[132] and "Traffic Factor 2."[133]

Reciprocal Compensation Traffic (Definitions § 1.616). Verizon's closely-related definitions of both "Reciprocal Compensation"[134] and "Reciprocal Compensation Traffic" are

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[128] *Id.*

[129] *See, e.g., National Lime Ass'n v. EPA*, 233 F.3d 625, 635 (D.C. Cir. 2000) (regulations that are remanded but not vacated are "le[ft] . . . in place during remand"); *Sierra Club v. EPA,* 167 F.3d 658,664 (D.C. Cir. 1999) (same).

[130] *See ISP Remand Order* ¶ 36 and n.66.

[131] Definition § 1.71.

[132] *Id.* at Definitions § 1.71a

[133] *Id.* at Definitions § 1.71b

[134] Verizon Definitions § 1.61a.

necessitated by the ***ISP Remand Order's*** intercarrier compensation obligations as they relate to Internet traffic. Not only did the ***ISP Remand Order*** prescribe an intercarrier compensation rate regime with regard to the treatment of locally rated Internet traffic, it also amended the definition of traffic that is subject to reciprocal compensation.[135] Indeed, the FCC no longer utilizes the term "local" to identify traffic that is subject to reciprocal compensation. The regulations the FCC promulgated with the ***ISP Remand Order*** – regulations that the D.C. Circuit recently kept in place – removed the word "local" from the reciprocal compensation regulations the FCC promulgated in August 1996.[136] Under the FCC's existing regulations, to be eligible for reciprocal compensation, traffic now must meet two requirements. It must be:

(1) "Telecommunications traffic," which is defined as:

> Telecommunications traffic exchanged between a LEC and a telecommunications carrier other than a CMRS provider, except for telecommunications traffic that is interstate or intrastate exchange access, information access, or exchange services for such access (see, FCC 01-131, paras. 34, 36, 39, 42-43) . . . *See* 47 C.F.R. § 51.701(b)(1).

and

(2) the traffic must originate on the network of one carrier and terminate on the network of the other carrier.[137]

Verizon has proposed a definition of "Reciprocal Compensation Traffic" that is consistent with the FCC's ruling and captures these two key requirements for eligibility for reciprocal compensation:

> Telecommunications traffic originated by a Customer of one Party on that Party's network and terminated to a Customer of the other Party on that other Party's network, except for Telecommunications traffic that is interstate or intrastate

[135] ***See* 47 *C.F.R.*** § 51.701(e).

[136] ***See ISP* Remand Order** at ¶¶ 32, 34.

[137] ***See*** 47 C.F.R. § 51.701(e).

> Exchange Access, information access, or exchange services for Exchange Access or information access. The determination of whether Telecommunications traffic is Exchange Access or information access shall be based upon Verizon's local calling areas as defined by Verizon. Reciprocal Compensation Traffic does not include: (1) any Internet Traffic; (2) traffic that does not originate and terminate within the same Verizon local calling area as defined by Verizon; **(3)** Toll Traffic, including, but not limited to, calls originated on a 1+ presubscription basis, or on a casual dialed (10XXX/101XXXX) basis; (4) Optional Extended Local Calling Scope Arrangement Traffic; (5) special access, private line, Frame Relay, ATM, or any other traffic that is not switched by the terminating Party; **(6)** Tandem Transit Traffic; or, (7) Voice Information Service Traffic (as defined in Section 5 of the Additional Services Attachment). For the purposes of this definition, a Verizon local calling area includes a Verizon non-optional Extended Local Calling Scope Arrangement, but does not include a Verizon optional Extended Local Calling Scope Arrangement.

Verizon's definitions of "Reciprocal Compensation" and "Reciprocal Compensation Traffic" are necessary to clarify what traffic is subject to reciprocal compensation and what traffic is not.

Toll Traffic (Definition § 1.71). Verizon defines "Toll Traffic" as traffic that is not subject to (i) reciprocal compensation (***i.e.***, "Reciprocal Compensation Traffic") and (ii) the interim rate regime for Internet traffic (***i.e.***, "Measured Internet Traffic"). Verizon further clarifies that the toll traffic may be intraLATA toll **or** interLATA toll traffic depending on the originating and terminating points of the call. As discussed above, the use of these terms is consistent with the FCC's new intercarrier compensation rate regime.

Traffic Factor 1 and Traffic Factor 2 (Definitions §§ 1.71a, 1.71b). Verizon's Traffic Factors also implement the requirements of the ***ISP Remand Order.*** Verizon's proposed definitions for Traffic Factor 1 and Traffic Factor **2** describe billing factors that are used to separate traffic that is eligible for reciprocal compensation from traffic that **is** not for measurement and billing of traffic delivered over interconnection trunks.

Verizon's proposed language for § § 5.7.2 and **5.7.3** is necessary to make the agreement conform to the FCC's ***ISP Remand Order.*** Namely, these proposed terms define the boundary between (i) traffic that is subject to reciprocal compensation under the FCC's regulations,[138] and (ii) other traffic, such as Internet traffic, which is not.[139]

Consistent with binding federal law, and Verizon's definition of "Reciprocal Compensation," Section 5.7.3.1 provides that traffic is not subject to reciprocal compensation if it is "interstate or intrastate Exchange Access, Information Access, or exchange services for Exchange Access or Information Access."[140] Sections 5.7.3.1 through 5.7.3.7 specifically list the traffic that is not subject to the parties' reciprocal compensation obligations. For example, $5.7.3.3 provides that "Toll Traffic" is exempt from reciprocal compensation. As defined by Verizon, "Toll Traffic" (Definitions § 1.71) is traffic that originates from a customer of one party on that party's network and terminates to the customer of the other party on that party's network and is neither Reciprocal Compensation or Measured Internet Traffic.[141] That is, the traffic is "intraLATA Toll Traffic" as defined by the Commission, or "interLATA Toll Traffic" as defined by the Act.[142] Similarly, the remainder of Verizon's proposed § 7.3 also describes categories of traffic that are not subject to § 251(b)(5) in accordance with applicable law, including, Optional Extended Local Calling Area Traffic, special access traffic, Tandem Transit Traffic, and Voice Information Service Traffic.[143]

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[138] See Verizon's Proposed Agreement **$5.7.2**

[139] See Verizon's Proposed Agreement § 5.7.3 ***et seq.***

[140] Verizon's Proposed Agreement § 5.7.3.1. This is consistent with 42 C.F.R. § 51.701.

[141] See Definitions § 1.71

[142] ***See ISP Remand Order*** ¶¶ 37-39. The ***ISP Remand Order*** again made clear that access traffic and services for access traffic are excluded from § 251(b)(5). ***ISP Remand Order*** ¶¶ 37-38. This would also include the intrastate access charge regime because it "would be incongruous to conclude that Congress was concerned about the effects of potential disruption to the interstate access charge system, but had no such concerns about the effects on analogous intrastate mechanisms." ***Id.*** at ¶ 37 n. 66 (quoting ***Local Competition Order,*** 11 F.C.C.R. at 15896).

[143] See Verizon's Proposed Agreement §§ 5.7.3.4 through 5.7.3.7.

Verizon's proposed § 5.7.4 states that the parties will charge one another symmetrical reciprocal compensation rates. This provision embodies the *ISP Remand* ***Order's*** declaration that the interim regime "affects only the intercarrier *compensation* (*i.e.*, rates) applicable to the delivery of ISP-bound traffic. It does not alter carriers' other obligations under out Part 51 rules, 47 C.F.R. Part **51**."[144] Accordingly, § 5.7.4 merely provides that both parties pay and receive the same rate for the same category of traffic in accordance with 47 C.F.R. § 51.711.

Verizon's proposed § 5.8.1 succinctly provides that binding federal law governs the parties' rights and obligations with respect to intercarrier compensation treatment of "Internet Traffic." These sections streamline the parties' agreement by referring to the applicable FCC orders and regulations that govern the treatment of "Internet Traffic" for intercarrier compensation purposes.

[144] ***ISP Remand*** *Order* ¶ 78 n. 149.